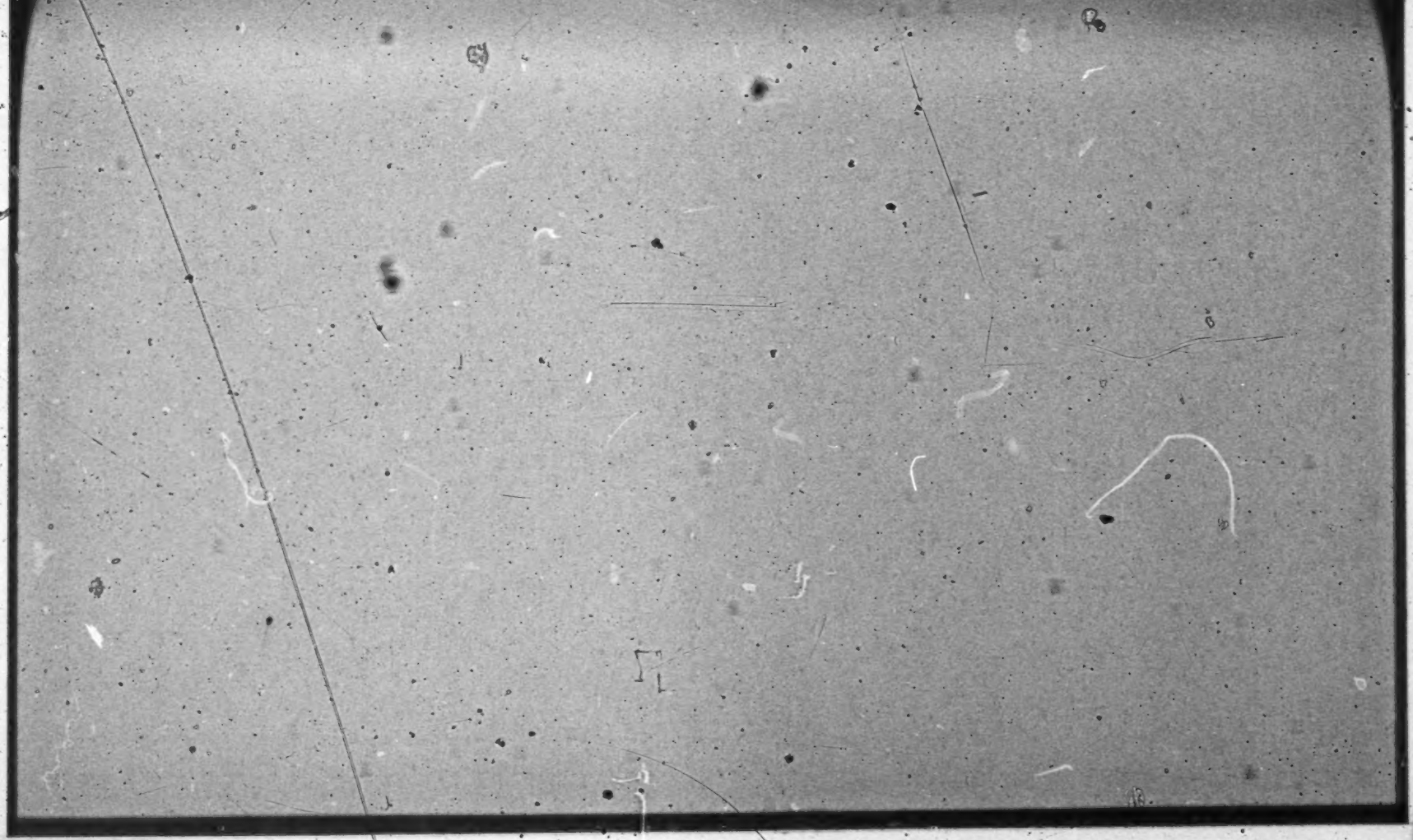

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, JAMES SHOWALTER, PLINY H. WOLFARD and PHILIP ZOERCHER, as Members of the State Board of Tax Commissioners of the State of Indiana; JAMES M. OGDEN, Attorney General of the State of Indiana

Appellants

v.

LAFAYETTE A. JACKSON

Appellee

BRIEF FOR APPELLEE

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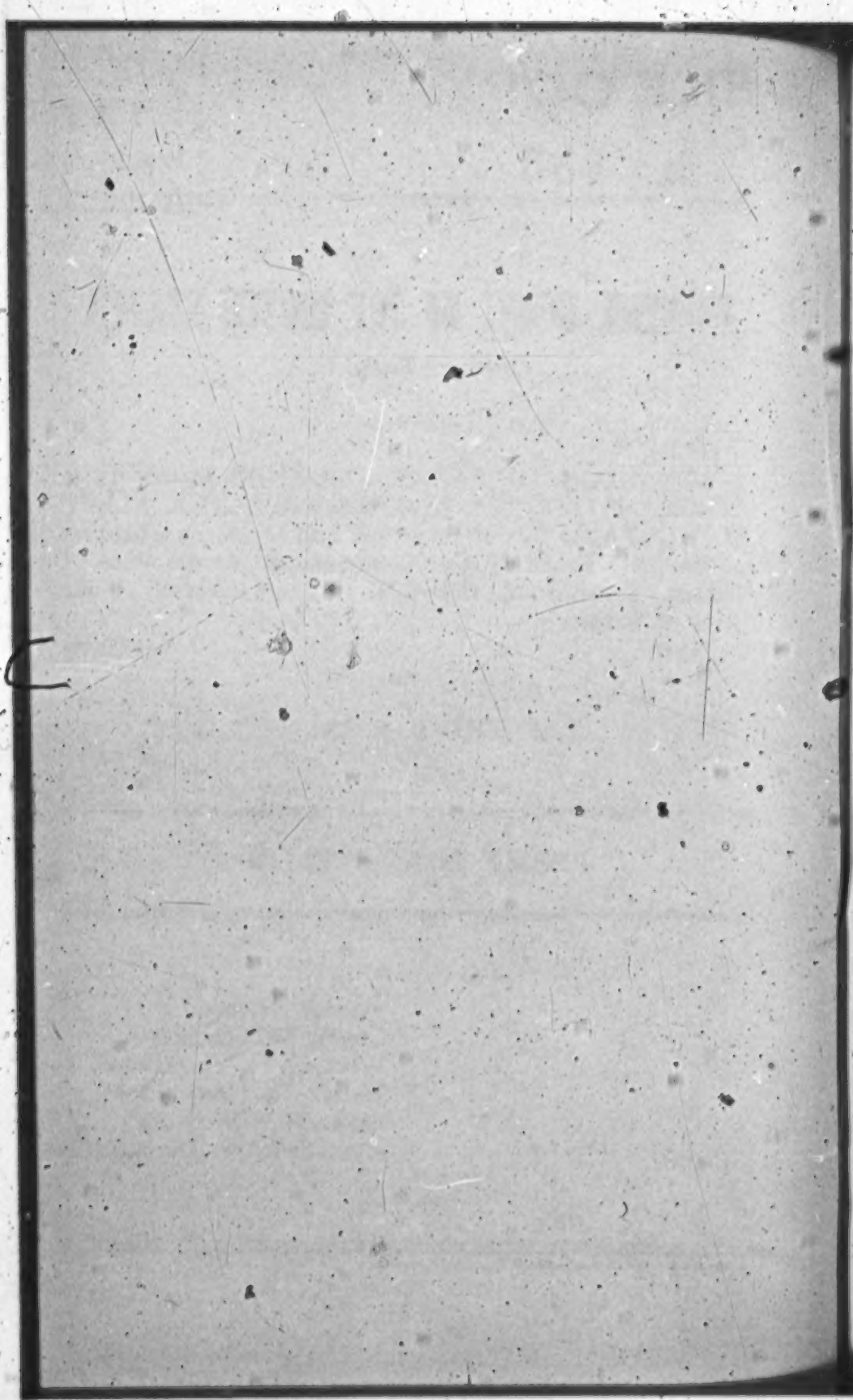

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Supreme Court of the United States

OCTOBER TERM, 1930.

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, JAMES SHOWALTER, PLINY H. WOLFARD and PHILIP ZOERCHER, as Members of the State Board of Tax Commissioners of the State of Indiana; JAMES M. OGDEN, Attorney General of the State of Indiana,

Appellants,

v.

LAFAYETTE A. JACKSON,

Appellee.

BRIEF FOR APPELLEE.

This appeal is by the defendants below from a decree of the District Court entered 15 February, 1930 (Rec. p. 65) enjoining the enforcement of Chapter 207 of the laws of the General Assembly of Indiana for 1929 imposing a graduated tax on all stores owned or operated in Indiana, commonly called the "Indiana Chain Store Act."

The action was commenced by Lafayette A. Jackson, of Indianapolis, Indiana, doing business under the firm name of Standard Grocery Company.

After overruling of motion to dismiss (p. 32) a three-judge court was organized as provided in Section 266 of the Judicial Code, and a temporary injunction was issued (p. 54). Answer was then interposed, and final hearing was had before SPARKS, Circuit Judge, and BALTZELL and SLICK, District Judges. Both sides introduced a substantial amount of testimony at this final hearing.

The opinion of the Court, per BALTZELL, D. J., is printed at pages 51-65 of the record and is reported in 38 Fed. (2d) 652.

The Court below held: First, that the Act in question had no relation to public health, public welfare, public morals or public safety and could not be sustained under the police power, and Second, that as a revenue measure the classification contained in the Act was arbitrary; that the Act was in violation of the plaintiff's constitutional rights under both the Constitution of the United States and of the Constitution of Indiana.

The brief for appellants does not adequately set forth the facts upon which the decision below was based.

Statement.

Appellee, a merchant resident in Indianapolis, keeping store through 225 stores in the city, has been taxed under the Act 1,800 times as much as other merchants carrying on the same business of the same size in the same city.

The Statute.

The title describes the Act as a licensing statute for the operation of stores.

Section 1 makes it unlawful for any person, firm or corporation, either foreign or domestic, to operate *any store* without first having obtained a license.

Section 2 requires application to be made for a license to conduct a store, the application to state the name of the store *and the location.* If the applicant desires to operate "more than one such store," a separate application must be made to obtain a license for "each such store" but the respective stores for which the applicant desires a license may be listed on one blank.

Section 5 provides that every person operating or maintaining "one or more stores or mercantile establishments, within this state, under the same general management, supervision or ownership," shall pay annually license fees graduated to the number of stores under the same management. The license fees prescribed are:

> Upon one store—"$3 for each such store."
> Upon two stores or more, but not to exceed five stores,—"$10 for each such additional store."
> Upon each store in excess of five, but not to exceed ten,—"$15 for each such additional store."
> Upon each store in excess of ten, but not to exceed twenty,—"$20 for each such additional store."
> Upon each store in excess of twenty,—"$25 for each such additional store."

By Section 7, the provisions of the Act apply to every person, firm, corporation, copartnership or association, either domestic or foreign, "which is controlled or held with others by majority stock ownership or ultimately controlled or *directed by one management* or association of ultimate management."

The Act, by definition, classifies under the term "store," all store management regardless of the number of separate store locations, Section 8 in this respect being:

> "The term 'store' as used in this act shall be construed to mean and include *any store or stores* or any mercantile establishment or establishments

which are owned, operated, maintained or *controlled by the same person*, firm, corporation, copartnership or association, either domestic or foreign, in which *goods, wares; or merchandise of any kind*, are sold, either at retail or wholesale."

The discrimination is thus against *store ownerships* regardless of the merchandise sold, depending solely upon the number of store locations. The license fee for the identical store may be $3 or $25, depending solely upon what other stores its proprietor owns or controls.

The complete text of the Act is printed as a footnote to the opinion below at page 51 of the record, and, in somewhat more convenient form, is also printed in an appendix hereto.

The complaint.

The complaint alleged that plaintiff conducts as an individual 225 stores in Indianapolis with more than $200,000 invested therein and with annual sales in excess of $1,000,000; that under the statute, plaintiff would be required to pay a license tax of $5,443, whereas there are a large number of persons in similar business with larger amounts invested and larger volume of business in *one store than in all plaintiff's stores together* who would be required to pay a license fee of $3 (pp. 3, 10); that there are more than 500 persons in Indiana selling varieties of merchandise, similarly situated on whose behalf the suit is brought (p. 4) and that the statute violates plaintiff's rights, in itemized respects, under both the state and federal constitution (pp. 11-14).

The answer.

Certain allegations and admissions of the answer are important.

The answer asserts that the classification made in the statute "is a legal and proper exercise of the police power, to prevent and curtail a practise conceived to be promotive of monopoly" (p. 39).

The answer contends that plaintiff's stores and all similar stores "are affected with a public interest" in that said stores are selling to the public articles generally used by the public (p. 43).

The answer alleges that the Act "is, *in part* a tax measure" and admits that it "has no immediate relation to the public health, public morals or public safety," but asserts that it is a regulation to "discourage monopoly of retail and wholesale trade generally throughout the State of Indiana" and asserts that "the plaintiff's stores, and *all stores similar thereto* in method of operation and management as well as *ownership*, are *affected with a public interest* in that said *stores are selling* to the public generally the necessities of life, food stuffs, and *articles generally used or consumed by the public*" (Rec. p. 43).

The answer admits that the plaintiff for thirty years has been a resident of the City of Indianapolis (p. 36), and conducts his business as an individual operating his stores in a number of different locations in the City of Indianapolis (p. 37).

Evidence on the trial.

(a) *No distinction between stores based on number of locations.*

Defendants' witness testified to the "advantages" which chain stores had in respect of capital, experience, skill, quantity buying and "insistence upon better methods of treatment of the public so as to meet the needs of the consuming public" (pp. 121-129). They are "good qualities." The general effect is to lower prices but "Every

advantage that I have spoken of as relating to the chain group is that which inheres, primarily, in volume and management *without respect to whether it is involved in a chain group or in a single store*" (p. 130).

It does not relate to form of organization—whether administering 50 or 100 or 1 (p. 130).

In this connection, William A. Rawls, Dean of the School of Commerce and Finance of Indiana University, *a witness for appellants*, testified (p. 131):

> "Q. *The fact that it is administering multiplely owned stores has nothing to do with it*, but it is the fact that it is administering a large business that develops the situation that you have referred to? A. *That is true.* But I might add that the management of a large number of stores may contribute to the more rapid increases in the size.
>
> "Q. Just as the manager of a large unit store, with many departments, may develop the ability to strengthen and enlarge those departments? A. Yes.
>
> "Q. And the problem would be identical, wouldn't it in the case of Macy or Gimbel—or, taking it locally, in connection with Ayres, or Block? A. *Yes, I would say the problem would be the same. There is no difference in the functions that are performed here—the function of retailing.*"

And Gisler, a wholesale grocer and secretary of the Indiana Wholesale Grocers Association, also a witness for appellants, testified (p. 137):

> "Q. If sales were increased in the individual unit stores, you would have the same results, would you not? A. Yes, you would."

The record further establishes that none of the elements of successful merchandising is peculiar to operations of branch stores as distinct from operations of a single store (pp. 73, 102).

The same type of merchandise is carried in chain stores as is carried in unit stores (p. 74).

The use of the automobile and good roads have had a tendency to allow the customer to go farther to shop; the chain store thus preserves the small community as a trading center, not only for itself but for other retailers (p. 111).

(b) *No monopoly or tendency thereto. Competition keen.*

There is no suggestion in the record that there is any monopoly, or danger of monopoly, in the State of Indiana in any article or product sold in chain stores or among the "goods, wares, or merchandise of any kind" sold in stores.

There is no proof of any monopoly of an idea or method of store management. The tendency is not toward monopoly but toward development of successful merchandising. Chain store development is analogous to the earlier department store development, and to the mail order development which in 1900 and 1908 respectively caused similar prejudice on the part of competitors (pp. 106, 107).

There are 44,027 retail stores in Indiana; 1,594 chain grocery stores; 8,486 grocery stores not in chains; 1,094 drug stores of which 99 are chain drug stores. The chain retail stores represent less than 8% of the total stores in Indiana (p. 82, 83).

Of 1,500,000 retail stores in the whole country, less than 150,000 are operated by chain store groups; and these chain stores are operated by 8,000 different chain store groups. The competition between them is intense. There is no federation between them looking toward monopoly or suppression of competition (p. 72). The competition met by appellee is very keen (p. 120).

Of the retail stores of the country, approximately 63% are independent or unit stores; 16% are department

stores; 12% are chain stores; and 4% are mail order houses (pp. 100, 101). Competition has been open, and there is no tendency to develop into any monopoly (p. 105).

P. H. Nystrom, Professor of Marketing at Columbia University, testified:

> "I have not found anything in my study which indicates a tendency on the part of chain stores to develop into a monopoly in this country or to be inimical to the general public welfare" (p. 105).

The competition between chain stores and the larger group of independent or unit stores has lowered prices to the public (p. 106). And defendants' expert spoke of "the competition that chain stores have among themselves as well as the keener competition of the better independent stores" (p. 124).

All merchandising has undergone great changes during the last 50 or 80 years (p. 84). The retail trade in small communities has been declining for 30 years and long before the chain stores appeared in them (p. 110). Generally speaking the chain store in the smaller communities has stimulated business in such communities (p. 111).

The rate of failures in unit stores has not varied more than a fraction of one per cent. during the past five years (p. 82).

There are many instances, some of which are given in the record, of chain stores in Indiana failing (p. 84).

(c) *Act harshly discriminatory.*

The record gives instances of different stores doing a much larger business than the plaintiff in the City of Indianapolis and required to pay a tax of only $3 as contrasted with the plaintiff's tax of $5,443.

L. S. Ayres & Company operates 124 separate departments in its store, which is conducted from a single location. Its total volume of business is more than $8,000,000 per year (pp. 81, 116). Its license fee is $3.

William H. Block & Company operates 86 separate departments in one location in the City of Indianapolis. Its total business is more than $8,000,000 per year (pp. 81, 115). Its license fee is $3.

This business is highly competitive with the business of the chain stores.

Persons owning a greater number of stores with more money invested in a business similar to that of the plaintiff but with one store in Indiana, will pay only $3. The Lerner Shops operate 145 stores, with one store, however, in Indiana. A. G. Spaulding Company operates 54 stores, with one store in Indiana. National Shoe Shops, Inc., operate 72 stores, with one store in Indiana (p. 82). Their license fees are $3.

Large numbers of stores independently owned and controlled are in associations or "voluntary chains" under which co-operative buying is conducted for the group.

In the United States, in the food field there are a larger number of retail stores grouped for co-operative buying in "voluntary chains" than there are retail outlets operated by chain store companies (p. 75). There are several hundred grocery stores in Indiana using the service of the Independent Grocer's Alliance (p. 89). L. S. Ayres, a large department store is in a co-operative group (p. 95). There are co-operative groups to a great extent in the drug trade (p. 95).

These independently owned units—members, nevertheless, of such co-operative associations—are, under the Act, required to pay a license of only $3.

(d) *Arbitrary classification. "Store," no unit of value. Number of stores under one ownership, no measure of value.*

One store with an inventory of $3,500, doing a business of $24,000 may have 7 turnovers a year, whereas another with $3,000 inventory may do a $115,000 business, with 37 turnovers (p. 94).

The largest store in Indianapolis is a unit store, belonging to a co-operative group of 17 department stores (p. 103).

The small grocery store has, according to defendants' witness, been the dumping ground for those who didn't have anything else to do. A farmer, a retired man, or a widow buys a grocery store and tries to make a living. No question of efficiency seems to have entered into the matter (p. 137).

The unit store is in many instances in co-operative groups for co-operative buying, and group advantages (p. 76).

Chain stores operate in many fields: food stores, clothing, women's ready to wear, boots and shoes, dry goods, auto supplies, practically every line (p. 72). They have the same variation as the single store in the selection of items (p. 74).

There are two general types of chain store: the "shopping merchandise," as Woolworth and Kresge, usually having a central store in a down town shopping district; and the "convenience merchandise" where the housewife demands a convenient location, accessible in a neighborhood sense (pp. 72, 73).

The mere addition of a new unit or store to an existing group of chain stores does not increase the sales more than arithmetically. It is in reality less than arithmetically, because of limiting factors (p. 76). The additional

unit has its own group of expenses (p. 77). The volume of sales of the group to which it is added is not increased (p. 105).

(e) *No distinction in civic relationships.*

A. H. Gisler, secretary of a large wholesale grocery in Indiana, who was one of appellants' witnesses, said (R. p. 134):

> "I have found that civic movements in a community have generally been entered into by the chain store operators in that community and increasingly in the ratio to the increase in chain store management as shown in that community."

Again, this witness said (R. p. 137):

> "The civic spirit in a community varies with practically every individual. There are troubles in every community over this man or that man who does not respond to the demand for civic spirit. In its essentials it reverts to types of men and individuals. We find people responding to civic spirit in self-interest, by compulsion or the desire to be helpful. This is true of every community with or without chain stores."

Appellants, at page 13 of their brief erroneously state that on the trial "it was conceded that the man who *both* lives and *has his capital invested* in a community takes a greater interest in community activities than one who does not" (p. 134). The concession in reality was "that a man who lives in a community takes a greater interest in community affairs" (p. 134).

On appellants' evidence it varies with each individual (p. 137).

The opinion below.

The opinion herein was rendered before Equity Rule 70½ (promulgated 2 June, 1930, to take effect 1 October, 1930), but states the grounds of decision, the facts of the record and the conclusions. Thus the court below, in the first part of its opinion considers the rules for determination as laid down by this Court. It then considers the practical operation of the Act and its effect and makes what are in the nature of fact findings on the evidence. The last part of its opinion involves the conclusions of invalidity.

1. The Court held that the Act could not be sustained upon the theory of an exercise of the police power inasmuch as it did not relate to the public health, the public welfare, the public morals or the public safety (pp. 54, 55).

2. As a revenue measure, the Court considered the rules for determination laid down by this Court in a number of cases:

(a) that clear and hostile discriminations against persons and classes, especially if of an unusual character, might be obnoxious (p. 56);

(b) that classification must rest upon some ground of difference having a fair and substantial relation to the object of legislation. The Legislature cannot arbitrarily select a certain class of persons for taxation and justify its acts by calling it classification (p. 57);

(c) mere difference is not enough (p. 59);

(d) the practical operation of the Act is to be regarded and dealt with according to its effect (pp. 59, 60).

3. The Court then found on the evidence:

(a) That it could not be disputed that the amount of the taxes to be paid by the plaintiff is determined

"not by the amount of capital invested, the amount of sales, or the value of such business, but solely by the number of stores owned by him" (p. 60).

(b) That plaintiff owns 225 grocery stores all in the City of Indianapolis with a capital investment of approximately $200,000. The annual gross sales are in excess of $1,000,000. He will pay a total tax of $5,443 annually (p. 60).

(c) That under the evidence many firms in Indiana having larger sums invested, and larger gross incomes but business similar to plaintiff will pay a tax of only $3 annually (p. 60).

(d) That the evidence also discloses that other persons owning a greater number of stores, with larger sums of money invested and much larger gross income and in similar business but with only one store in Indiana, will be required to pay a tax of only $3 annually (pp. 60, 61).

(e) That the testimony was in detail from plaintiff and defendants and gave a general history of the original and growth of the "chain store." *"The Act in question is evidently intended to levy a heavier occupational tax upon the owners and operators of so-called 'chain' stores than that levied upon the owners and operators of a single store"* (p. 61).

(f) That the evidence discloses that there are 44,000 retail stores in Indiana of which 8% are chain stores (p. 61).

(g) That the fact is, as shown by the evidence, that competition between "chain store" operators is very active and aggressive (p. 61).

(h) That one store owner may take more interest in civic affairs than another; there is no universal rule on the subject; plaintiff is a resident, citizen and taxpayer of Indianapolis in which all his stores are situated. Relative civic interest does not constitute separate classes for tax purposes (p. 62).

(i) That the inequality based solely on the number of stores owned was apparent (p. 64).

(j) That the mere fact that one person reaches his trade by more than one store does not place him in a different class from the person who has one store and reaches his trade by delivery (p. 64).

(k) That there is no real and substantial difference between such persons granting the legislature the authority to classify occupations for tax purposes (p. 64).

(l) That the difference is simply in the detail in which the business is conducted and does not create a different class (p. 64).

4. The Court then concluded that the classification if enforced, would deny the owner of more than one store the equal protection of the law as guaranteed by the Constitution of the United States and would deprive him of his rights under the Constitution of Indiana; that the classification was not reasonable and did not rest upon a ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced would be treated alike; that it is arbitrary (pp. 64, 65).

SUMMARY OF ARGUMENT.

I.

The Act violates the rights of appellee under the 14th Amendment. The court below properly held that the Act could not be sustained upon the theory of the exercise of the police power.

(a) The facts found support the conclusion of the court below that the Act does not relate to public health, public welfare, public morals or public

safety, and cannot be sustained as an exercise of the police power.

(b) That police power not involved is deducible from the text of the Act.

(c) Mere ownership of stores, irrespective of commodity sold, is not a business affected with a public interest.

(d) The arbitrary discriminations of the statute have no relationship to any anticipated evil.

II.

"Store" is no unit of value nor is "number of stores under one ownership" any measure of value.

The court below properly held that the Act, as a tax statute, rested on no reasonable classification having any relation to taxation and in its arbitrary discrimination against a character of store ownership, violates the 14th Amendment.

III.

The court below properly held that the Act deprives appellee of rights guaranteed him under the Constitution of the State of Indiana.

IV.

That ownership in chain stores threatens no detriment to the public has herein a factual basis of record. The decision below should be affirmed.

ARGUMENT.

POINT I.

The Act violates the rights of appellee under the Fourteenth Amendment. The court below properly held that the Act could not be sustained upon the theory of the exercise of the police power.

Appellants in their brief herein urge that the Act is justified as a police measure in tending to discourage a tendency toward monopoly in a method of distribution and thus encouraging ownership in unit stores. It is said to perform a regulatory function (Appellants' Brief, pp. 7, 22, 27, 30). And the answer herein likewise asserts that the Act has its justification in the police power "to prevent and curtail a practise conceived to be promotive of monopoly" (p. 39). The monopoly is alleged to be "of retail and wholesale trade generally throughout the State of Indiana" (p. 43). And the power to regulate is sought to be predicated upon the claim asserted in the answer that *all stores* similar to plaintiff's in operation or *in ownership* "are affected with a public interest" in that they sell to the public necessities of life, foodstuffs *"and articles generally used or consumed by the public"* (p. 43).

The answer admits that the Act "has no immediate relation to the public health, public morals or public safety" but claims a relation to the public welfare in the respects above mentioned (p. 43).

A.

Facts supporting conclusion of court below that the Act does not relate to public health, public welfare, public morals or public safety and cannot be sustained as an exercise of the police power.

The record establishes that there is no distinction in method of operation or manner of ownership which is the subject of monopoly on the part of branch or chain stores as distinguished from unit stores; that methods of buying and distribution are freely selected by merchants; that group purchasing is not limited to large businesses but is open to the small merchant through voluntary chain or co-operative associations; that defendants' witnesses testified that there was no function of retailing and no commodity peculiar to chain stores (Rec. pp. 73, 74, 121-129, 130, 131, 137).

Detailed statistics show that chain stores in Indiana are in a small minority compared with unit stores, and that throughout the country the minority as measured by the volume of business done is smaller than department stores (Rec. pp. 72, 82, 83, 100, 101).

Not only is there no evidence in the record of any monopoly of method, ownership or commodity, but there is uncontradicted evidence that trade is free, that competition is open and keen, and that there is no federation between chain stores (Rec. pp. 72, 105, 124). The competition has lowered prices to the public (p. 106).

The court below found that stores in "chains" are approximately 8% of the retail stores in Indiana and that competition between "chain store" operators is "very active and aggressive" (p. 61).

B.

That police power is not involved is deducible from the text of the Act.

The Act, although admittedly directed against chain stores does not mention them. It does not mention any monopoly in idea, method of business, ownership or commodity. It contains no regulation or prohibition. Stores selling foodstuffs, the rarest jewels, the more dangerous drugs, or firearms are in the same class under it as those dealing in patented articles, sporting goods or books. The discouragement of anonymous monopoly in anonymous method or product cannot be suspected as its object particularly when Indiana has an entirely adequate statute in customary form against monopolies (Sections 4636-4668, Burns Revised Statutes, 1926 Edition). And of course there can be no inference that there is any monopoly in *all* goods, wares and merchandise, being sold wholesale and retail in the State of Indiana.

It is not permissible to spread such an all-inclusive net against all storekeeping, with meshes so devised that there is no conceivable appropriate legal effect. No interest of the general public, as distinguished from a particular class can justify the imposition of this unusual and unnecessary restriction upon lawful business.

Lawton v. *Steele*, 152 U. S. 133, 137;
Tyson & Brother v. *Banton*, 273 U. S. 418, 443;
Adams v. *Tanner*, 244 U. S. 590.

C.

Mere ownership of stores, irrespective of commodity sold, is not a business affected with a public interest.

The Act defines the term "store" as "any store or stores" owned or operated by the same person or corporation, "in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale." *All, by definition, are of the same class.* The discrimination, however, is levelled against the number of stores in one management and is graduated against the number. It is thus the character of the ownership of all stores, in all commodities, which is proposed to be discriminated against.

A store is taxed at one rate if it is the sole store owned by one management. The same store is taxed at an entirely different rate if it is owned by a management *which also owns other stores.* Stores identical in character owned by one management are taxed at different rates.

The defendants' answer pleads that all stores similar to the plaintiff's "in method of operation and management as well as *ownership,* are *affected with a public interest* in that said stores are selling to the public generally the necessities of life, foodstuffs, and *articles generally used or consumed by the public*" (p. 43). And all appellants' arguments when analysed in their legal categories will be seen to be predicated upon this contention that because of this claimed element the state may thus regulate under the police power or regulate by discriminatory burdens under the tax power.

The legislation, from the standpoint of attempted regulation, is unprecedented in that *all storekeeping in all commodities,* wholesale and retail, is sought to be brought within the regulatory power of the Legislature. No

special circumstances are indicated justifying this extraordinary attempt to regulate all storekeeping, and, through harsh burdens, to discourage or stamp out a particular character of store ownership. The extreme character of the legislation is emphasized by appellants' attempted justification of the Act in question as a price affecting statute to discourage the chain store owner to the encouragement of the unit storekeeper (Appellants' Brief, p. 27). For it is only by compelling a raising of the sales price of chain store goods that the unit storekeeper can get his statutory "encouragement" in competition therewith.

In *Tyson & Brother* v. *Banton*, 273 U. S. 418, this Court, per SUTHERLAND, J., said in this connection, at pages 429-30:

> "*The power to regulate property, services or business can be invoked only under special circumstances;* and it does not follow that because the power may exist to regulate in some particulars it exists to regulate in others or in all.
>
> "The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 246, but *exists only where the business or the property involved has become 'affected with a public interest.'* "

Certainly no tendency toward monopoly in chain storekeeping, or in all goods, wares, or merchandise, or in any unspecified goods, wares or merchandise, can be advanced as justification for the attempt on the part of the Indiana Legislature to decree the character of the ownership of all storekeeping. No monopoly can exist in manner of store ownership.

In *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, this Court held violative of the Fourteenth Amendment an act of Kansas fixing wages in a packing house. TAFT, Ch. J., at pages 537-8, said:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the woodchopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays *one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.*
>
> "An ordinary producer, manufacturer or shopkeeper may sell or not sell as he likes, *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 320; *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 256, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, it usually distinguishes private from *quasi*-public occupations."

and further, at page 538:

> "There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are countrywide, a short supply is not likely, and the danger from local monopolistic control less than ever."

In *Truax* v. *Raich*, 239 U. S. 33, the Arizona Act requiring any employer of more than five workers to employ not less than 80% qualified electors or native-born citizens, was held unconstitutional. This Court, per HUGHES, J., said at page 40:

> "The discrimination here involved *is imposed upon the conduct of ordinary private enterprise.*"

and further, at page 41:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 762; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, 590; *Coppage* v. *Kansas*, 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."

and further, at page 43:

> *"No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for as we have said it relates to every sort.* The discrimination is against aliens as such in competition with citizens in the described range of enterprises and in our opinion it clearly falls under the condemnation of the fundamental law."

Appellants urge (their brief, p. 23) that the classification is "uniform in its operation on all members to which it is made applicable." But so was the discrimination

against aliens in the above case. All aliens were treated alike. Uniformity of discrimination is no justification.

The Act in the case at bar is as arbitrary as would be a tax on all merchants graduated against the number of hats they owned—to the encouragement of the "one hat man."

In *Barbier* v. *Connolly*, 113 U. S. 27, this Court said, at page 31, that the Fourteenth Amendment intended "that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

Some thirty years ago several instances occurred of legislation discriminating against the particular method of storekeeping known as the "Department Store"; and it was attempted, by legislation, to prohibit or discourage the sale of general articles of merchandise in one location, just as in the case at bar, the attempt is made to discourage the sale of such articles at separate locations. The vice of the legislation it will be observed, however, was the same, namely, a discrimination against a character of store ownership.

In *City of Chicago* v. *Netcher*, 183 Ill. 104, the statute levelled at department stores, prohibited sale of certain classes of goods in the same store in which were sold certain other classes, none being harmful in themselves. The Court held it void as a purely arbitrary interference of rights guaranteed by the United States Constitution, at page 111 saying:

> *"General stores have always dealt in all kinds of merchandise, and no one has ever imagined that the comfort, safety or welfare of the public was in any manner or to any extent injured or prejudiced*

> *by them.* Public health and public comfort are in no way affected by selling the different kinds of merchandise enumerated in different departments of the same building, and would not be if the same clerk should sell them; nor would the public welfare or comfort be increased by compelling a customer to buy one kind of merchandise in one store and another in some other store. * * * It is a mere attempt to deny a property right to a particular class in the community where all other members of the community are left to enjoy it."

In *State ex rel. Wyatt* v. *Ashbrook*, 154 Mo. 375, an Act of Missouri classifying department stores separately for the purpose of license taxation and imposing upon them greater burdens than those imposed on other classes of merchants was held unconstitutional. The act made it unlawful to sell goods of more than *one group or class under one management*, without obtaining a license for which a tax was to be paid.

The Court held that it would look beyond the mere title to determine its real object, and said at page 385:

> "In no sense can this most extraordinary act be regarded as a police measure, and consequently it does not fall within the protection of the police power. It nowhere attempts to protect any public interest or defend against any public wrong. It shows upon its face that regulation is not its purpose, but that revenue, or undue restriction, in the interest of others not embraced in the class designated, is the aim in view."

The Court, at page 386, stated that it could not conjecture why the selling of articles of merchandise in one store under one unit of management affected the public in any manner different or greater than would result if the same articles were sold "in different store buildings

run by the same person, corporation or company as independent establishments." If the selling of the articles enumerated was innocent and harmless when pursued separately as a business it did not become harmful when "united for sale under one unit of management and conducted in one building." "Such grouping together for sale or disposition of those articles of daily use and necessity do not endanger or threaten the peace and good order of society."

The Court held, at page 392, that the Constitution had been violated by the arbitrary and unreasonable classification of merchants of a natural class for the particular purpose of the imposition.

The Court concluded, at page 396:

> "It is truly 'classification run wild.' It is special legislation unrestrained. To have made the act apply to all merchants of a given avoirdupois or to those employing clerks of a designated stature, or to those doing business in buildings of a special architectural design, would have been as natural and as reasonable a classification for the purpose in view, as the classification made by this act."

The facts and reasoning in this Missouri case are peculiarly applicable to the present discussion.

In *Great Atlantic & Pacific Tea Co., et al.* v. *Doughton*, 196 N. C. 145, the Court held a branch store act unconstitutional. A subsequent statute was later sustained (*Great Atlantic & Pacific Tea Co.* v. *Maxwell*, 199 N. C. 433, 155 S. E. 838) and is now on the docket of this Court.

In *Williams* v. *Standard Oil Co.*, 278 U. S. 235, this Court, per SUTHERLAND, J., stated that it was settled by recent decisions of this Court that the State could not fix prices of commodities unless the business is affected with a public interest; that nothing was gained by reiter-

ating the statement that the phrase was indefinite; it was the established test of legislative power to fix prices; and at page 240 decided that the business of dealing in gasoline, regardless of size or extent, in no essential respect differed "from a great variety of other articles commonly bought and sold by merchants and private dealers in the country" and was not "affected with a public interest."

D.

The arbitrary discriminations of the statute have no relationship to any anticipated evil.

The statute, by its definition, places in the same class every store or stores under the same ownership regardless of the commodity or merchandise dealt in, and then fixes as the basis of discrimination, solely the number of locations or separate stores within one ownership. The discrimination is, therefore, under its own definition and under the evidence, between businesses of the same character and nature and is predicated upon the incident of multiple ownership. The same store may be taxed at one rate if its owner is a one store person, but at an entirely different rate if its owner is a 20 store person. In reality, the effect upon the sales price of goods, wares or merchandise sold by chain stores, is urged by appellants as the justification for this act. It is suggested that the Legislature was empowered by these discriminatory burdens to give the owner of the unit store an advantage in his competition with the chain store. The group or quantity buying of the chain store, making possible cheaper goods to the consumer, (although under defendants' testimony a common incident to all growth and success in business) seems to be the particular element sought to be discouraged by this act (Appellants' Brief, pp. 11, 27, 51).

In *Fairmont Creamery Company* v. *Minnesota*, 274 U. S. 1, a statute of Minnesota provided that any persons in the business of buying milk for manufacture or sale, who should discriminate between localities in the state by purchasing at a higher rate in one locality than is paid by such person in another locality, after making due allowance for difference in cost of transportation, should be deemed guilty of unfair competition.

The State Court affirmed a conviction, and held that the statute was justified in preventing the destruction of competition by the purchasing methods of "centralized" creameries, saying, as quoted in this Court's opinion at page 7:

> "A centralized creamery, supplied with ample capital and facilities, has the ability and meets the temptation to destroy competition at a buying station by overbidding, absorbing the resultant losses, if any, through the profits of its general business and, when competition is ended, to buy on a non-competitive basis. If it does all this successfully, it has a monopoly, and may or may not treat producers justly."

This Court reversed, per McReynolds, J., at page 9, saying:

> "The real question comes to this—May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. *We think the inhibition of the statute has no reasonable relation to the anticipated evil*—high bidding by some with purpose to monopolize

or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse.

"In *Adams* v. *Tanner*, 244 U. S. 590, 594, this court said: 'Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skilfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.'"

In *Liggett Co.* v. *Baldridge*, 278 U. S. 105, a statute of Pennsylvania which required that no corporation should thereafter own (in excess of those owned and operated at the time of the passage of the act) any drug store unless all the members were licensed pharmacists, was held violative of the Fourteenth Amendment. The statute was a trade regulation aimed to prevent the growth of chain stores.

This Court, per SUTHERLAND, J., at page 111, said:

"The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health,

safety, morals, or some other phase of the general welfare. Here the pertinent question is: What is the effect of mere ownership of a drug store in respect of the public health?"

This Court further, at page 113, said:

"The act under review does not deal with any of the things covered by the prior statutes above enumerated. It deals in terms only with *ownership*. It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'" (Citing cases.)

The Court, at page 113, said that the mere stock ownership of a corporation, owning a drug store, could have no real or substantial relation to public health, and that the act created an unreasonable and unnecessary restriction upon private business, saying:

"No facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion. *It is a matter of public notoriety that chain drug stores in great numbers, owned and operated by corporations, are to be found throughout the United States. They have been in operation for many years.* We take judicial notice of the fact that the stock in these corporations is bought and sold upon the various stock exchanges of the country and, in the nature of things, must be held and owned to a large extent by persons who are not registered pharmacists. *If detriment to the public health thereby has resulted or is threatened, some evidence of it ought*

> *to be forthcoming. None has been produced, and,* so far as we are informed, either by the record or outside of it, *none exists.*"

In *Yu Cong Eng* v. *Trinidad Collector*, 271 U. S. 500, the Chinese Bookkeeping Act requiring all Chinese in the Philippine Islands to keep account books in English, Spanish, or some local dialect, was defended as a fiscal measure facilitating the collection of taxes. This Court held it invalid under the Philippine Bill of Rights that no law should "deny to any person therein the equal protection of the laws," saying, per TAFT, Ch. J., at page 528:

> "As against the Chinese merchants of the Philippines, we think the present law, which deprives them of something indispensable to the carrying on of their business, and is obviously intended chiefly to affect them as distinguished from the rest of the community, is a denial to them of the equal protection of the laws."

In *Engel* v. *O'Malley*, 219 U. S. 128, this Court, per HOLMES, J., said, at page 138:

> "It is true, no doubt, that where size is not an index to an admitted evil the law cannot discriminate between the great and small."

In the case at bar the number of stores dealing in general merchandise is not an index to any evil whatsoever. The law has discriminated solely against the number of stores under one management. This purely numerical discrimination, having no relationship to values, is, under the facts of this case, as arbitrary and unreasonable as would be a discrimination against certain letters of the alphabet. It is as though the State should attempt to tax those named Smith at a higher rate than those named Xavier, to encourage the latter.

In *Burnes Natl. Bank* v. *Duncan*, 265 U. S. 17, this Court, per HOLMES, J., at page 24 said:

> "The States cannot use their most characteristic powers to reach unconstitutional results."

In *Gulf, Colorado & Santa Fe Railway* v. *Ellis*, 165 U. S. 150, this Court in regard to arbitrary classifications prohibited by the Fourteenth Amendment, said, at page 155:

> "The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

This Court then quoted with approval from *State* v. *Loomis*, 115 Mo. 307, 314, as follows:

> "Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

And, at page 159, stated:

> "But arbitrary selection can never be justified by calling it classification."

Merchants for years have customarily conducted business through branch stores, and appellants have cited no precedent in this Court justifying what they claim was an exercise of police power in respect thereto, where a general storekeeper, resident in Indianapolis, carrying on his business "in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents" has been taxed 1,800 times as much as others carrying on the same business, of even larger size, in the same city.

POINT II.

"Store" is no unit of value nor is "number of stores under one ownership" any measure of value.

The Court below properly held that the Act as a tax statute rested on no reasonable classification having any relation to taxation and in its arbitrary discrimination against a character of store ownership violates the Fourteenth Amendment.

Appellants further attempt to sustain the act as a revenue measure (their brief, pp. 7, 29), but we do not find any suggestion that the harsh and arbitrary discrimination against a particular character of store ownership, obvious upon the face of the act, has any relationship whatsoever to the raising of revenue. No reason for the discrimination against a particular class of store ownership having any relation to taxation has ever been suggested. The discrimination is obviously without any possible relation to taxation. And appellants in their answer quite frankly attempt its justification as *in part* a tax measure intended to discourage monopoly in a particular ownership of stores generally (p. 43).

The court below has found, on the evidence, that the inequality is apparent (p. 64); that it is harsh and unreasonable (pp. 60, 61); that there is no real and substantial difference between ownership of one store and ownership of a number of stores to justify a difference of classification for the purpose of taxation; that persons owning one store handle the same goods as plaintiff and compete with him; that competition is active and aggressive; that there is no justification for placing the owners of chain stores in a different category from owners of unit stores, and that the classification, if enforced, will violate the Fourteenth Amendment (pp. 61-64).

These holdings are based upon the evidence. *There is no evidence justifying any contrary holding.* The evidence emphasizes the harsh character of the discrimination within a wide range of application, and defendants, called upon to justify such a capricious and extraordinary discrimination, have been unable to suggest any justification.

Obviously a "store" is no unit of value. It varies from bankruptcy to millions; from a peanut stand to a department store ten stories high and occupying a city block. *Nor are numbers of stores under one ownership any measure of value.* Here, also, the variation is from bankruptcy to millions through all conceivable combinations and elements. And the evidence establishes that the harshly oppressive *graduations against numbers of stores* have no relation to any tax purposes, that values have no relationship to such graduations.

In *Frost* v. *Corporation Commission*, 278 U. S. 515, this Court held violative of the Fourteenth Amendment a licensing statute of Oklahoma regulating the business of cotton ginning, which permitted an individual to engage in the business only after showing public necessity, but

allowed a corporation to engage in the same business in the same locality without such a showing. This Court, per SUTHERLAND, J., said at pages 522-3:

> "That a greater burden thereby is laid upon the latter than upon the former is clear. Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality; but not necessarily that inequality forbidden by the Constitution. The inequality thus prohibited is only such as is actually and palpably unreasonable and arbitrary. *Arkansas Gas Co.* v. *Railroad Comm.*, 261 U. S. 379, 384, and cases cited.
>
> "The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 37. This Court has several times decided that a corporation is as much entitled to the equal protection of the laws as an individual. (Citing cases.) The converse, of course, is equally true. A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case, the classification, in order to be valid, 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' (Citing cases.) That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' (*Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155; *Louisville Gas Co.* v. *Coleman*, *supra*.)"

This Court further said, at page 524:

> "The differences relied upon to justify the classification are, for that purpose, without substance. * * * As a basis for the classification attempted, it lacks both relevancy and substance. Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, namely, that of reaping profits. That is to say, it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation. *Power Co.* v. *Saunders*, 274 U. S. 490, 493; *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 37, 39; *Quaker City Cab Co.* v. *Penna*, 277 U. S. 389, 402."

Appellants' arguments, always advanced in such cases, that there is equality of treatment within each class, is not to the point. No statute can be sufficiently intricate to indulge in entirely individual discriminations. This Court has uniformly held that the vice of such statutes lies in defective classification.

In *Quaker City Cab Co.* v. *Penna*, 277 U. S. 389, this Court held violative of the Fourteenth Amendment an act of Pennsylvania which taxed gross receipts derived by corporations from operation of taxicabs, but did not tax like receipts of individuals or partnerships in the same kind of business. In other words, the tax was on the character of ownership, just as in the case at bar the tax is on the character of ownership. For here, there is a tax

of $3 on one store, provided the owner owns no other, but a tax of $25 on an identical store, provided it is held in an ownership which also holds other stores. In the *Quaker City Cab* case, this Court, per BUTLER, J., at page 402 said:

> "The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. *Power Co.* v. *Saunders*, 274 U. S. 490. No decision of this Court gives support to such a classification. In no view can it be held to have more than an arbitrary basis. As construed and applied by the state court in this case, the section violates the equal protection clause of the Fourteenth Amendment. See *The Railroad Tax Cases*, 13 Fed. 722. *County of Santa Clara* v. *Southern Pacific R. R. Co.*, 18 Fed. 385. *Northern Pacific R. Co.* v. *Walker*, 47 Fed. 681. The tax cannot be sustained."

In *Schlesinger* v. *Wisconsin*, 270 U. S. 230, a Wisconsin tax act decreed that every transfer made within six years of death without consideration was conclusively presumed to have been made in contemplation of death. It was taxed as such. This Court held the tax act violative of the Fourteenth Amendment, and answered the contention that it might serve a useful ulterior purpose, saying at page 240:

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment

and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B.' Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.

"No new doctrine was announced in *Stebbins* v. *Riley*, 268 U. S. 137, cited by defendant in error. A classification for purposes of taxation must rest on some reasonable distinction."

In *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, this Court, per McREYNOLDS, J., said, at page 210:

"In this Court the presently approved doctrine is that no State may tax anything not within her jurisdiction without violating the Fourteenth Amendment."

And further said, at page 212:

"Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. * * * The difference between the two things" (*i. e.*, between tangibles and intangibles), "although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

In *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, a tax statute of Kentucky, as a condition to recording mortgages not maturing within five years, levied a tax of 20¢ on each

$100 of value secured, but exempted mortgages maturing within that period. This Court, at page 37, stated and cited its former decisions as holding that the rule under the Fourteenth Amendment was applicable to the exercise of all the powers of the State, "including the power of taxation," and that the power of classification under the taxing power must be reasonable and not arbitrary, and must rest upon some ground of difference having some fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced should be treated alike, and added, at pages 37-8:

> "That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155. *Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.*"

This Court added, at page 38:

> "The application of the equal protection clause does not depend upon what name is given to the tax. * * * But classification good for one purpose may be bad for another; and it does not follow that because the state may classify for the purpose of proportioning the tax, it may adopt the same classification to the end that some shall bear a burden of taxation from which others under circumstances identical in all respects save in respect of the matter of value, are entirely exempt.
>
> "Here it seems clear that a circumstance which affects only taxable values has been made the basis of a classification under which one is compelled to pay a tax for the enjoyment of a necessary privi-

lege which, aside from the amount of the recording fee which is paid by each, is furnished to another as a pure gratuity. Such a classification is arbitrary. It bears no reasonable or just relation to the intended result of the legislation. The difference relied upon is no more substantial, as the sole basis for the present classification, than a difference in value between two similar pieces of land would be if invoked as the sole basis for a like classification in respect of such property."

In *Southern Railway Co.* v. *Greene*, 216 U. S. 400, a tax act of Alabama was sought to be sustained as a license tax upon an additional privilege for the continued exercise of a corporate franchise. The tax was imposed upon foreign corporations but not upon domestic. This Court, per DAY, J., said at page 417:

"Arbitrary selection, it has been said, cannot be justified by calling it classification. (Citing cases.)

"It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the state and other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the state, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much

> more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the state, does violence to the Federal Constitution."

In *Chalker* v. *Birmingham & N. W. Ry. Co.*, 249 U. S. 522, this Court, per McReynolds, J., at page 527 said:

> "We can find no adequate basis for taxing individuals according to the *location of their chief offices*—the classification, we think, is arbitrary and unreasonable."

In *Bethlehem Motors Co.* v. *Flynt*, 256 U. S. 421, a North Carolina statute provided that every manufacturer of automobiles engaged in selling them in the State must pay a license tax of $500, but that if the manufacturer should file a sworn statement that at least three-fourths of the entire assets of the manufacturer were invested in bonds of the State or in property within the State and reported for taxation, the license tax should be reduced to $100. This Court held that such a tax act was violative of the Fourteenth Amendment as discriminatory against foreign corporations.

In *Hanover Insurance Co.* v. *Harding*, 272 U. S. 494, this Court held that a tax imposed upon foreign insurance companies, on the net receipts of all their business, was a denial of the equal protection of the laws, when domestic insurance companies paid no taxes on such net receipts.

The property of one person may not be burdened upon a basis so wholly different from that used for ascertaining the contribution demanded of others as to produce mani-

fest inequality. There must be some adequate reason for classification.

Kansas City So. Ry. v. *Road Imp. Dist.*, 256 U. S. 658.

In *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, this Court held that a State law which taxed all the income of local corporations derived from business done outside of the State and business done within it, while exempting entirely the income derived from outside the State by local corporations which did no local business, was arbitrary and violative of the Fourteenth Amendment, saying at page 415, per PITNEY, J.:

> "Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory."

and further, at page 416:

> "It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect; and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design."

In *City of Danville* v. *Quaker Maid, Inc.*, 211 Ky. 677, the City of Danville enacted a license and occupation tax ordinance which imposed a license tax of $12 on "regular service" grocery stores and of $40 on "self-service, cash and carry" grocery stores.

The Court held the ordinance discriminatory, at page 678 saying:

> "The only difference between the business of appellee and that of the ordinary grocery is that appellee extends credit to no one and makes no deliveries. But this difference in this detail of conducting the business affords no reasonable ground for classifying appellee on a basis for taxation purposes different from that of the ordinary grocery store."

In *People ex rel. Farrington* v. *Mensching*, 187 N. Y. 8, the Court at pages 19-20 suggested as a supposititious extreme of arbitrariness in classification a tax "on farms according to the number of fields in which they are divided" and said that such a tax "would impose a heavier burden upon one farm than upon another of the same size, situation and value." That supposititious extreme has here been exceeded. This tax, graded against the number of roofs under which a business is transacted, regardless of the nature or value of the business, is as arbitrary as would be a tax graded against the slope of such roofs.

Appellants urge as analogous herein (their brief, p. 50) the three following cases of this Court:

(a) *Metropolis Theatre* v. *Chicago*, 228 U. S. 61. The case arose on demurrer and this Court affirmed a dismissal of the complaint by the Supreme Court of Illinois. The City of Chicago had passed an ordinance which provided that "if it be intended to produce, offer or present entertainments of the first class" and the highest price of admission is $1 or more, the license fee should be $1,000, if the highest price of admission exceeded 50¢ but was less than $1, the annual license fee should be $400. The highest court of Illinois (246 Ill. 20) pointed out in its opinion that the ordinance was passed under a statute which author-

ized the city "To license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals and other exhibitions, shows and amusements, and to revoke such license at pleasure." The Supreme Court of Illinois then said:

> "Under this ordinance every person desiring to give an entertainment is left free to fix the charge of admission as he sees fit. He may thus elect into which class he desires to be placed. Presumably each person will select the class which will best promote his interests."

This Court, affirming, said at page 69:

> "In other words, there is natural relation between the price of admission and revenue, *some advantage certainly that determines the choice.* The distinction obtains in every large city of the country."

We find it difficult to see any analogy between the *Metropolis* case and the case at bar. The distinctions seem broad and plain. In the *Metropolis* case, the business was of a nature to be subject to license. In the case at bar it is not. In the *Metropolis* case there was no capital invested in the price to be charged for shows or entertainments. Any one intending to give a show could judge whether he had better charge $1 and pay a license of that class or 50¢ and pay a license of the lower class. Some advantage determined his choice. In the case at bar no such selection is open to storekeepers. Billions of dollars of investments from all over the country are committed to existing stores and when the store owner applies for his license he has no choice. It is not a question of selecting a number. It is a question of abandoning invested capital. This Court in the *Metropolis* case stated

that there was a natural relation between price of admission and revenue. Monetary units of value were involved. Whereas in the case at bar the record establishes that there is no such natural relationship between ownership in one store and ownership in multiple stores. No monetary unit or measure is involved. Plaintiff's competitors under one roof do a larger business and pay 1/1800 part of his tax. He might have 225 competitors each of which would do as large a business as he. Yet the sum total of the tax of such 225 competitors would be less than ⅛ of the tax upon him.

(b) *Quong Wing* v. *Kirkendall*, 223 U. S. 59, wherein an act of Montana imposed a license fee upon all persons engaged in the laundry business other than steam laundries, with the proviso that it should not apply to women so engaged where not more than two women were employed. This Court held that there was a distinction between a hand laundry and a steam laundry, and that the ground of distinction based on sex was not without precedent.

On the record this Court was unable to determine that the act was aimed at the Chinese, and concluded (p. 64):

> "Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way. Therefore without prejudice to the question that we have suggested, when it shall be raised, we must conclude that so far as the present case is concerned the judgment must be affirmed."

(c) *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, wherein a tax on "Fisheries: Salmon canneries" was 2¢ per case and on "Fish-Oil-Works: Using herring in whole or in part in the manufacture of fish-oil: $2 per bbl."

"Fertilizer and Fish Meal Plants: Manufacturing fertilizer and Fish Meal in whole or in part from herring: $2 per ton."

The taxpayer urged upon this Court that the tax upon him was too high "as compared with taxes levied upon other lines of business." And no difficulty was found by the Court below or by this Court in recognizing differences in the different businesses taxed.

But in none of the three cases relied upon by appellants was there any classification without difference, or discrimination in the same business against character of ownership.

No precedents of this Court have been referred to by appellants wherein State legislation of the type or character of the enactment at bar has been sustained.

POINT III.

The court below properly held that the Act deprives appellee of rights guaranteed him under the Constitution of the State of Indiana.

The Act decrees, in Section 1 thereof, that after the 1st of July, 1929, it shall be *unlawful* to conduct any store in Indiana without having obtained a license. The statute is penal. The offender, by Section 9, is made guilty of a misdemeanor and subject to daily fine and penalty.

Under the Indiana decisions the Legislature has no authority to pass such a sweeping act where no exercise of the police power is involved. This is true although the General Assembly has full authority to levy occupational taxes for the purpose of raising revenue. (*Shuman* v. *City of Fort Wayne*, 127 Ind. 109).

In that case the Court stated that all licenses are in their nature restrictive and that the power to license depends upon the concurrent power to prohibit. In the course of its opinion the Supreme Court at page 115 said:

> "The power to license depends upon the concurrent power to prohibit. The business or occupation is declared unlawful, except upon compliance with certain conditions. A license, then 'is a privilege granted to carry on some occupation or exercise some right which could not be legally exercised without the grant of such license. The pursuit of the prohibited occupation becomes a franchise in the power of the municipality to grant, and the license fee is the price exacted for the right to exercise the franchise.' Horr and Bemis Mun. Police Ordinances, section 257; *Chilvers* v. *People*, 17 Mich. 42."

We submit that a license may not be required as a condition precedent where the business is wholly lawful, especially where, as here, the Legislature does not use the license merely as a tax receipt or a method of collecting the revenue, but in fact outlaws the business unless a license be obtained.

Under the Indiana decisions, if a store operator should fail to obtain a license, his contracts are rendered void and unenforceable.

In the case of *Bright National Bank* v. *Hartman*, 61 Ind. App. page 440, at page 447, the Court said:

> "It is the law of Indiana that where a statute forbids the carrying on of any business without first procuring a license, paying a tax, inspection, registration, complying with prescribed tests, or the like, contracts relating thereto made by persons in carrying on such business are void, though the statute contains no express provision to that effect."

The net result is that a lawful business is outlawed as an incident to raising revenue and not because of any power on the part of the state authorities to regulate it or make rules for the manner in which it should be conducted.

This Act renders unlawful the business of merchandising. It leaves all other lawful business occupations in a wholly different situation. It grants to other classes of citizens, relatively, privileges and immunities which are not on equal terms held out to the operators of stores.

Section 23 of Article 1 of the Indiana Constitution provides:

> "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The appellants urge that the act in question was passed to encourage one person in competition with another. For $3 the unit store owner secures the privilege of having his competitor burdened with a tax of $5,443. Equality has been destroyed. Such a tax constitutes a special privilege in the nature of a monopoly. "It begins in a pretense for the public good and ends in crippling the general industry."

Cooley, Law of Taxation, 2nd Ed., p. 235.

In *Powell* v. *Pennsylvania*, 127 U. S. 678, this Court at page 684 said:

> "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an es-

sential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The Court assents to this general proposition as embodying a sound principle of constitutional law."

In the case at bar the Court below at page 58 said:

"The framers of the Constitution of the State of Indiana obviously had in mind the fair and equal treatment of all the citizens of such State with respect to the assessment and collection of taxes. The provisions contained in such Constitution and Bill of Rights would so indicate."

POINT IV.

That ownership in chain stores threatens no detriment to the public has herein a factual basis of record. The decision below should be affirmed.

This Court has taken judicial notice of the fact that chain stores in great numbers are to be found throughout the United States; that they have been in operation for many years; this Court has determined that no detriment to the public in the absence of evidence will be presumed to have resulted or to be threatened from the character of their ownership; to be persuaded to the contrary this Court has stated that some evidence should be forthcoming (*Liggett Co.* v. *Baldridge, supra*).

The unanimous decision of the statutory three judge court has the factual basis of evidence adduced by both sides. No evidence of detriment to the public has been forthcoming. Affirmative evidence disproves any detriment. Testimony of appellants' witnesses precludes its existence and the answer of appellants admits that the

Act has "no immediate relation to public health, public morals or public safety."

Thus, although general storekeeping is not a business so far affected with a public use as to become subject to state regulation of this character, and the decision below would well be justified by the text of the Act itself and the obvious lack of relationship of provisions to purpose, nevertheless, there is, in addition, factual foundation of record.

O'Gorman & Young v. *Hartford Fire Ins., Co.*,
U. S. decided 5 January, 1931
(Adv. Sheet No. 5, p. 162).

No error has been suggested in the manner in which the three judge court arrived at its conclusions. After the adequate hearing and full determination intended by Section 266 have been had (*Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10), it should take a very clear case upon the record to justify this Court in now setting aside such conclusions on questions of fact (*Chicago G. & W. Ry.* v. *Kendall*, 266 U. S. 94, 100).

The decree appealed from should be affirmed.

Respectfully submitted,

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APPENDIX.

ACT OF INDIANA GENERAL ASSEMBLY.
APPROVED MARCH 16, 1929.

(Acts 1929, Chapter 207, page 693.)

An Act requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state board of tax commissioners in connection therewith, and prescribing penalties for the violation thereof.

Section 1. Be it enacted by the General Assembly of the State of Indiana, That from and after the first day of July, 1929, it shall be unlawful for any person, firm, corporation, association or co-partnership, either foreign or domestic, to operate, maintain, open or establish any store in this state without first having obtained a license so to do from the state board of tax commissioners, as hereinafter provided.

Sec. 2. Any person, firm, corporation, association or co-partnership desiring to operate, maintain, open or establish a store in this state shall apply to the state board of tax commissioners for a license so to do. The application for a license shall be made on a form which shall be prescribed and furnished by the state board of tax commissioners, and shall set forth the name of the owner, manager, trustee, lessee, receiver or other person desiring such license; the name of such store; the location, in-

cluding the street number, of such store; and such other facts as the state board of tax commissioners may require. If the applicant desires to operate, maintain, open or establish more than one such store, he shall make a separate application for a license to operate, maintain, open or establish each such store, but the respective stores for which the applicant desires to secure licenses may all be listed on one application blank. Each such application shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section 5 of this act.

Sec. 3. As soon as practicable after the receipt of any such application, the state board of tax commissioners shall carefully examine such application to ascertain whether it is in proper form and contains the necessary and requisite information. If, upon examination, the state board of tax commissioners shall find that any such application is not in proper form and does not contain the necessary and requisite information, it shall return such application for correction. If an application is found to be satisfactory, and if the filing and license fees, as herein prescribed, shall have been paid, the state board of tax commissioners shall issue to the applicant a license for each store for which an application for a license shall have been made. Each licensee shall display the license so issued in a conspicuous place in the store for which such license is issued.

Sec. 4. All licenses shall be so issued as to expire on the thirty-first day of December of each calendar year. On or before the first day of January of each year, every person, firm, corporation, association, or co-partnership having a license, shall apply to the state board of tax commissioners for a renewal license for the calendar year next ensuing. All applications for renewal licenses shall

be made on forms which shall be prescribed and furnished by the state board of tax commissioners. No license shall lapse prior to the thirty-first day of January of the year next following the year for which such license was issued, and if, by such thirty-first day of January, an application for a renewal license has not been made, the state board of tax commissioners shall notify such delinquent license-holder thereof, by registered mail, and if application is not made for and a renewal license issued on or before the last day of February, next ensuing, the former license shall lapse and become null and void. Each such application for a renewal license shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section 5 of this act.

Sec. 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or maintaining one or more stores or mercantile establishments, within this state, under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fees prescribed in sections 2 and 4 of this act.

The license fees herein prescribed shall be as follows:

1. Upon one store, the annual license fee shall be three dollars for each such store;

2. Upon two stores or more, but not to exceed five stores, the annual license fee shall be ten dollars for each such additional store;

3. Upon each store in excess of five, but not to exceed ten, the annual license fee shall be fifteen dollars for each such additional store;

4. Upon each store in excess of ten, but not to exceed twenty, the annual license fee shall be twenty dollars for each such additional store;

5. Upon each store in excess of twenty, the annual license fee shall be twenty-five dollars for each such additional store.

Sec. 6. Each and every license issued prior to the first day of July of any year shall be charged for at the full rate, and each and every license issued on or after the first day of July of any year shall be charged for at one half of the full rate, as prescribed in section 5 of this act.

Sec. 7. The provisions of this act shall be construed to apply to every person, firm, corporation, co-partnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Sec. 8. The term "store" as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained or controlled by the same person, firm, corporation, co-partnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale.

Sec. 9. Any person, firm, corporation, co-partnership or association who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each and every day that such violation shall continue shall constitute a separate rate and distinct offense.

Sec. 10. Any and all expenses incurred by the state board of tax commissioners in the administration of this act shall be paid out of the funds accruing from the fees imposed by and collected under the provisions of this act. All money collected under the provisions of this act less the expenses incurred in the administration of this act, shall be paid into the state treasury, monthly, by the state board of tax commissioners, and shall be added to and shall constitute a part of the general fund. Of the funds which shall accrue to the general fund during the fiscal year ending September 30, 1929, under the provisions of this act, the sum of two hundred and fifty thousand dollars shall be transferred to the school relief fund by the auditor of state; and of the funds which accrue to the general fund under the provisions of this act during the fiscal year ending September 30, 1930, the sum of five hundred and fifty thousand dollars, and during the fiscal year ending September 30, 1931, the sum of five hundred thousand dollars, and during each fiscal year thereafter the sum of three hundred thousand dollars shall be transferred to the school relief fund by the auditor of state. The transfer of such amount from the general fund to the school relief fund shall be made on the first day of January, 1930, and on the first day of January of each year thereafter, and no part of the money so transferred shall revert to the general fund at any time. The money so transferred shall be distributed in the same manner as the school relief fund is distributed, as provided by law, except that if any portion of such fund so transferred during any fiscal year is not needed in the regular school relief fund distribution, such excess may be used to apply on deficits existing from preceding years. The term "school relief fund" as used in this section shall be construed to mean that portion of the common school fund

set apart by section 3, chapter 201, of the Acts of the general assembly of 1921 and which is therein designated as a "relief fund."

Sec. 11. The state board of tax commissioners is hereby authorized to employ such clerical assistants as may be necessary to carry out and administer the provisions of this act, and to prepare and print such blanks, forms, reports, receipts and any and all other things which may be necessary to provide for the administration of this act, and to pay any and all such expenses so incurred out of the fund collected under the provisions of this act. The sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the general fund of the state treasury not otherwise appropriated, to be available upon the taking effect of this section, and to be used by the state board of tax commissioners in defraying any expenses which may be incurred in the administration and in preparing to administer this act before sufficient funds shall have been collected from license fees, as hereinbefore provided. As soon as a sufficient amount of license fees shall have been collected under the provisions of this act, the two thousand dollars hereby appropriated, or so much thereof as shall have been used, shall be returned to the general fund. Whereas an emergency exists for the immediate taking effect of this section, the same shall be in full force and effect from and after its passage.

Sec. 12. If any section, provision or clause of this act should be declared invalid, such invalidity shall not be construed to effect the portions of the act not so held invalid.

Sec. 13. This act, except section 11, shall be in effect from and after the first day of July, 1929.

ARTICLE 1, SECTION 23, INDIANA CONSTITUTION

The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

ARTICLE 10, SECTION 1, INDIANA CONSTITUTION

The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes, as may be especially exempted by law.